SUPREME COURT, U. S.
No. 265
JUN 15 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CLARK'S GAMBLE CORPORATION, d/b/a CLARK'S DISCOUNT DEPARTMENT STORE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

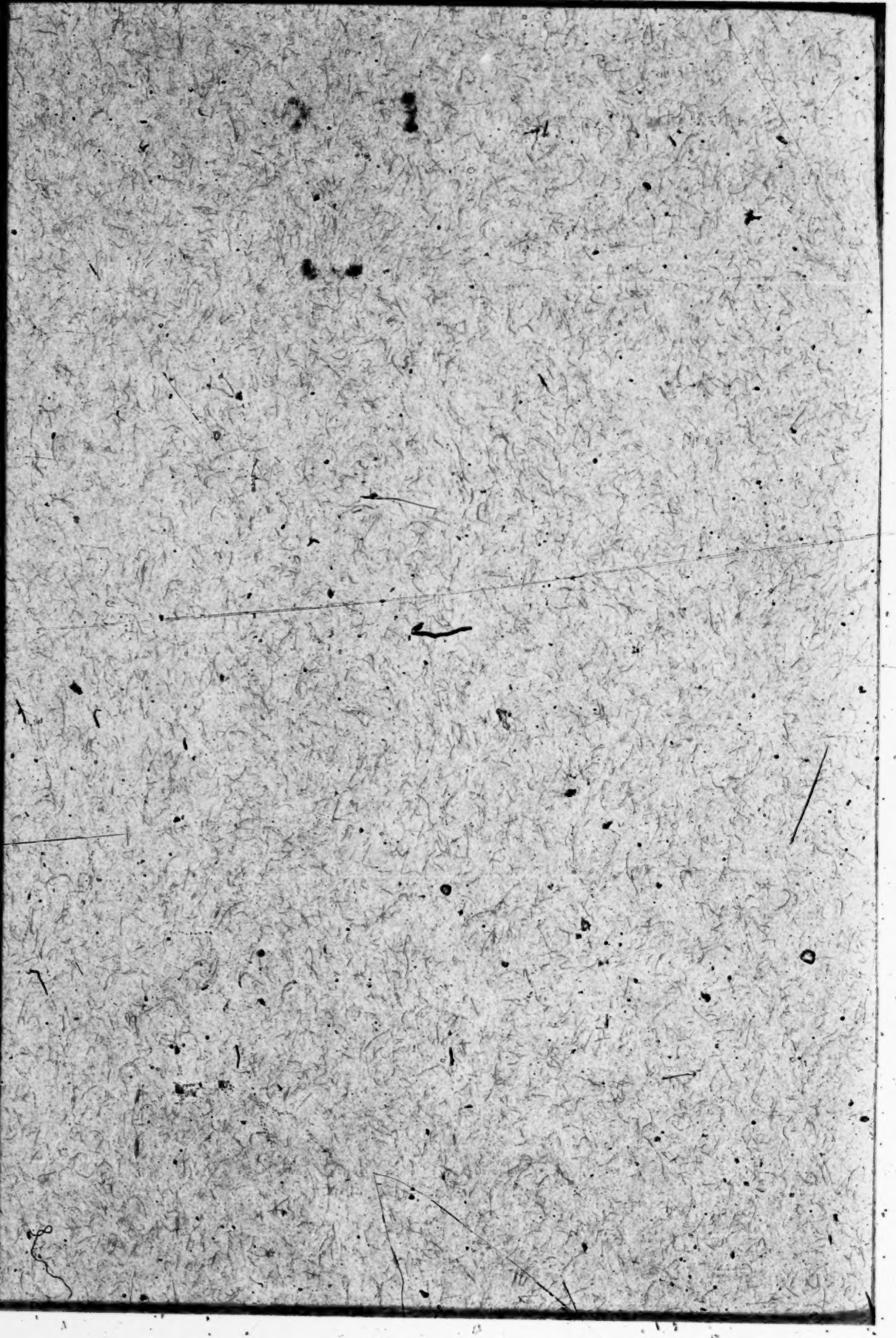
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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case on remand from this Court.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11-14), following the remand by this Court, 396 U.S. 23, is reported at 422 F. 2d 845; its initial opinion (App. C, *infra*, pp. 17-20) is reported at 407 F. 2d 199. The decision and order of the Board are reported at 168 NLRB No. 43.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 15) was entered on March 4, 1970. The Board's timely petition for rehearing *en banc* was denied (Judge Edwards dissenting) on April 10, 1970 (App. B, *infra*, p. 16). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether enforcement may be refused to an otherwise appropriate bargaining order of the National Labor Relations Board on the ground that the union in whose favor the order ran may have lost its majority status through employee turnover during the period following the commission of the employer's unfair labor practices.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act: * * *.

STATEMENT

This case was previously before this Court on the Labor Board's petition for a writ of certiorari, No. 439, October Term, 1969, certiorari granted and judgment vacated and remanded for reconsideration, 396 U.S. 23. The underlying facts of company, union and employee conduct and the proceedings before the Labor Board are set out at length in that petition. Here, it is necessary only to relate that Local 1262, Retail Clerks International Association, AFL-CIO obtained valid authorization cards from a sizeable majority of the employees at the Company's Glens Falls, N. Y., store and that before an election could be held the Company engaged in unfair labor practices[1] which the Board specifically found were of a kind calculated

[1] These practices, all in violation of Section 8(a)(1) of the Act, included surveillance of a union meeting, intimidation and interrogation of employees, and an attempt to prevent employees from talking with the Union's organizers.

to dissipate the Union's majority status and of such magnitude as to preclude the holding of a fair representation election. Accordingly, the Board concluded that, "in order to remedy the unfair labor practices committed and to restore the *status quo ante*," it was necessary not only to enter a cease and desist order, but also to require the Company, on request and as a remedy for the unfair labor practices, to bargain with the Union as the representative of the employees at the Glens Falls store. (J.A. 57a-58a, 59a-61a).[1]

On appeal, the court of appeals sustained the Board's findings, but declined to enforce the proposed bargaining order. It gave two reasons for this interference with the Board's remedy: (1) its doubt, in view of employee turnover at the Glens Falls store, whether "the majority status persists which existed years ago" (App. C, *infra*, p. 20); and (2) its feeling that authorization cards are "a notoriously unreliable method of determining the majority status of a union" (*ibid.*). Rather than enforce the remedy, it called on the Board to determine the extent of employee turnover and, if found substantial, to conduct a representation election; otherwise, the Board was ordered to consider whether "in view of the passage of time" since the bargaining order was entered, its enforcement was still appropriate (*ibid.*).

In response to the Board's ensuing petition for a writ of certiorari, *supra*, this Court vacated the judgment of the court of appeals and remanded the case for "further consideration in light of *NLRB* v.

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[1] "J.A." refers to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk.

Gissel Packing Co., 395 U.S. 575, 596 U.S. 23. On reconsideration, the court of appeals again refused to enforce the Board's remedy. Apparently believing that *Gissel* was relevant only to the second of the considerations mentioned in its first opinion—the reliability of authorization cards—it stated that that consideration was only a "postcript to the opinion." It was the issue of employee turnover which had been crucial and, in the court's view, that issue was unaffected by *Gissel*. The court noted that the Trial Examiner's decision was not issued until nearly a year after the filing of the charge and that it took the Board almost another full year to issue its order.[3] The court concluded that "the delay was not occasioned by prosecrastination or delaying tactics on the part of the respondent, but rather by the Board and its employee," and that this "clearly takes the case out of the contemplation of *Gissel*." (App. A, *infra*, p. 12.) The court added (App. A, *infra*, p. 13):

> * * * The thrust and philosophy of the Act is that employees be represented by a bargaining agent of their choice and in this situation which fails to reflect the selection of an agent by the

[3] The period between the filing of the charge and the Trial Examiner's decision was in fact almost *two* years. The charge was filed on January 7, 1965; the Trial Examiner's decision issued on December 30, 1966. However, the Glens Falls charge was one of eight filed at about that time, in six different Regional offices of the Board, involving different Company stores. The time-lag between the filing of the charges and the Trial Examiner's decision was attributable in the main to efforts to consolidate the charges and complaints for purposes of a single hearing, decision, and order. The hearing was not concluded until September 20, 1966, and the Trial Examiner's decision issued three months later (J.A. 1a-4a).

employees sought to be affected, and where the period of personnel turnover has been extended by Board-occasioned delay, we conclude that it would be contrary to the intent of the Act to order enforcement.

REASONS FOR GRANTING THE WRIT

This second refusal of the Sixth Circuit to enforce the Board's bargaining order continues to rest upon considerations which this Court rejected in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. The Sixth Circuit's decision is also in conflict with *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, and with decisions of other courts of appeals. Accordingly, corrective action by this Court is again warranted.

1. Although the Sixth Circuit appears to have believed that *Gissel* did not speak to the issue of delay and resultant employee turnover, in fact this Court's opinion in *Gissel* reaffirmed the principle that the lapse of time between the filing of the unfair labor practice charge and the date of the Board's order is no bar to the enforcement of a Board bargaining order. The Court declared (395 U.S. at 610):

> We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB* v. *Katz*, 369 U.S. 736, 748, n. 16 (1962); *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union,

> which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board. * * *

For, the Court added (*ibid.*):

> If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," *Franks Bros.*, *supra*, at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. * * *

Thus, in *Franks Bros.*, *supra*, the Court sustained a bargaining order notwithstanding that employee turnover in the seven-month interval between the filing of the charge and the Board's issuance of a complaint allegedly had destroyed the union's majority, and that the Board's order did not issue for an additional seven months. 321 U.S. at 703. The Court agreed with the Board that "procedural delays, necessary fairly to determine charges of unfair labor practices * * * [should not] be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law." *Id.* at 705. Similarly, in *Katz*, *supra*, the Court sustained a bargaining order notwithstanding an almost three-year interval between the filing of the charge and the Board's decision (126 NLRB 288, 292). The Court stated: "Inordinate delay in any case is re-

grettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." 369 U.S. at 748, n. 16. And, in *Gissel* and the other cases consolidated with it, the time interval between filing of the charge and the Board's decision ranged from thirteen to thirty-two months.[3]

Given the litigating process, it is likely that there will always be a considerable interval between the filing of an unfair labor practice charge and final action by the Board. The interval here was by no means unusual, and resulted only from the usual vicissitudes of the process. To permit such delay to be used as an excuse for not enforcing an otherwise appropriate Board bargaining order—as the Sixth Circuit has done—enables the employer "'to profit from [his] own wrongful refusal to bargain,'" and "ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." *Gissel*, *supra*, 395 U.S. at 610, 612. And see *Rutter-Rex*, *supra*, 396 U.S. at 265. For the fair election which the employer's unfair labor practices precludes would occur at a time when the union enjoys widespread support among the employees. Under the Sixth Circuit's view, however, the employer

[3] For example, in the *Gissel* case itself, the charge was filed on February 11, 1965, and the Board decision issued on March 5, 1966 (Appendix in No. 573, O.T., 1969, Vol. I, p. 1); in *Sinclair*, the charge was filed on December 14, 1965, and the final Board decision issued on June 16, 1967 (Appendix in No. 585, O.T., 1969, pp. 166, 201); and, in *Heck's* the charge was filed on October 24, 1964, and the Board's decision issued on June 30, 1967 (Appendix in No. 573, O.T., 1969, Vol. II, p. 323).

committing unfair labor practices which preclude a fair election may be able to escape the Board's chosen remedy if during the inevitable time-lag in securing that remedy there is a substantial employee turnover. *Gissel, Rutter-Rex*, and the other decisions of this Court cited above foreclose such an anomalous result.

2. The view of the Sixth Circuit is also contrary to the decisions of other courts of appeals, which have rejected the contention that employee turnover resulting from the Board's delay in issuing its unfair labor practice decision and order is a justification for refusing to enforce an otherwise appropriate bargaining order. *National Labor Relations Board* v. *L. B. Foster*, 397 U.S. 990; *National Labor Relations Board* v. *Staub Cleaners, Inc.*, 418 F. 2d 1086, 1089-1090 (C.A. 2), certiorari denied, 397 U.S. 1038. As the Ninth Circuit stated in *Foster*, *supra* (418 F. 2d at 4):

> The delay is not the fault of the union; if it is anyone's fault, it is that of the employer. But regardless of fault, it is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration, on the basis of facts occurring after the Board's decision, is to put a premium upon continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts; as to which the Board must then readjudicate. * * * When is the process to stop?

CONCLUSION

For the foregoing reasons, and since the Board has made an adequate finding to support the bargaining

ter Co., 418 F.2d 1, 4-5 (C.A. 9), certiorari denied

order in this case,[4] we believe that the case is an appropriate one for summary reversal. See *National Labor Relations Board* v. *Int'l. Union, Progressive Mine Workers*, 375 U.S. 396, summarily reversing, 319 F. 2d 428 (C.A. 7). Accordingly, the Court should grant the petition for a writ of certiorari, reverse the judgment of the court of appeals insofar as it denied enforcement of the Board's bargaining order, and remand the case to that court with directions to enforce that order.

Respectfully submitted.

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JUNE 1970.

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[4] In *Sinclair*, one of the cases consolidated with *Gissel*, the Court held that the bargaining order was entitled to enforcement where the Board, as here, had found "that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." *Gissel, supra*, 395 U.S. at 615, 620.

APPENDIX A

No. 18354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK'S GAMBLE CORPORATION d b/a CLARK'S DISCOUNT DEPARTMENT STORE AND M. N. LANDAU STORES, INC., d b/a CLARK'S STORES, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Decided March 4, 1970

Before: WEICK, Chief Judge, and PECK and McCREE, Circuit Judges.

PER CURIAM. This case is before us under a remand of the Supreme Court which enjoins its "further consideration in the light of *National Labor Relations Board* v. *Gissel Packing Co., Inc.*, 395 U.S. 575."

Our earlier consideration of the case resulted in its remand to the National Labor Relations Board for a determination as to whether in view of the circumstances its Order requiring collective bargaining was "still appropriate." *Clark's Gamble Corp.* v. *N.L.R.B.*, 407 F.2d 199, 202. In its brief on the present remand the Board concentrates its argument on the fact that in *Gissel*, "[w]hile acknowledging the 'superiority of the election process,' the Supreme Court pointed out that 'where an employer engages

in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice.' ". 395 U.S. at 602. The Board would thus have it appear that the fact that the union's majority status had been determined on the basis of representation cards was a major factor in our determination, but a reading of our opinion will quickly dispel that thought. Our single sentence observation on that point appears in effect as a postscript to the opinion, and begins with the clause, "We add that our apprehension on this score is hardly abated by the fact that the 1964 majority determination was made on the basis of authorization cards, . . ." *Clark's Gamble Corp.* v. *N.L.R.B.*, *supra*, at 201.

Instead, the thrust of our opinion dealt with the long delay of the Board and its Trial Examiner in their handling of the case, and our expressed concern was with "the extent to which there [may have] been a change in the identity of the employees since the time demand for recognition was made." As we pointed out, the Trial Examiner did not issue his decision until nearly a year after the filing of the charge, and it then took the Board almost another full year to issue its order. We were and are concerned whether we are, and have been since the Board's order of November 16, 1967, dealing with substantially the same body of employees identified on the pay roster of December 22, 1964.

Emphasis was and is placed on the fact that the delay was not occasioned by procrastination or delaying tactics on the part of the respondent, but rather by the Board and its employee. This clearly takes the case out of the contemplation of *Gissel*, wherein the Board found "that the employer's refusal to bargain with the Union in violation of § 8(a)(5) was

motivated, not by a 'good faith' doubt of the Union's majority status, but by a desire to gain time to dissipate that status." 395 U.S. at 583. There is no suggestion in the record, much less any finding, that the present petitioner was guilty of any delaying tactics calculated to dissipate the majority status or otherwise.

The Board further argues that *Gissel* "makes plain that . . . intervening employee turnover" does not justify refusal to enforce an otherwise warranted bargaining order, but we find no reference therein to "intervening employee turnover." We earlier observed that "we need not resort to judicial notice to determine that retail clerical personnel is not unvarying since it is apparent from this record that in this store changes in personnel were frequent." The thrust and philosophy of the Act is that employees be represented by a bargaining agent of their choice and in this situation which fails to reflect the selection of an agent by the employees sought to be affected, and where the period for personnel turnover has been extended by Board-occasioned delay, we conclude that it would be contrary to the intent of the Act to order enforcement.

The petitioner presently urges that the actions on its part which formed the basis of the 8(a)(1) violations were neither so extensive in number or so pervasive (*Schrementi Brothers, Inc.*, 179 NLRB No. 147, 72 LRRM 1481, decided December 3, 1969) as to require a bargaining order, and asks that the Board order be set aside and enforcement denied. While as clearly indicated in our earlier opinion, we regard the evidence of violations as at best marginal, it cannot be said that there is not substantial evidence in the record to support the findings of the Board, and we again decline to vacate the order.

A study of *Gissel* does not indicate any inconsistency between its conclusions and those herein expressed and the case is remanded to the National Labor Relations Board for the purposes indicated in our opinion of February 11, 1969.

APPENDIX B.

Filed Mar. 4, 1970, Carl W. Reuss, Clerk

No. 18,354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE AND M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES, PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

RETAIL CLERKS INTERNATIONAL ASSOCIATION AND ITS LOCALS 1262 AND 1552, AFL-CIO, INTERVENOR

ORDER

Before: WEICK, Chief Judge, and PECK and McCREE, Circuit Judges.

This case having been considered upon remand from the Supreme Court of the United States;

It is ordered that the case be and it is remanded to the National Labor Relations Board for the purposes indicated in the Court's opinion of February 11, 1969.

It is further ordered that Petitioners recover from Respondent the costs as itemized below.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

COSTS: To be recovered by Petitioners

Filed Apr. 10, 1970, Carl W. Reuss, Clerk

No. 18,354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK'S GAMBLE CORPORATION d b/a CLARK'S DISCOUNT DEPARTMENT STORE AND M. N. LANDAU STORES, INC., d b/a CLARK'S STORES, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Before: WEICK, PECK and MCCREE, Circuit Judges.

Respondent's petition for rehearing having come on to be considered, and of the judges of this Court who are in regular active service only Judge Edwards having favored consideration en banc,

IT IS ORDERED that the petition be, and it is hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

APPENDIX C

No. 18354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE AND M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES, PETITIONERS,

v.

*NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS INTERNATIONAL ASSOCIATION AND ITS LOCALS 1262 AND 1552, AFL-CIO, INTERVENOR

ON PETITION to Review and Set Aside and on Cross-Petition to Enforce an Order of the National Labor Relations Board.

Decided February 11, 1969

Before: WEICK, Chief Judge, and PECK and McCREE, Circuit Judges.

PER CURIAM. Unfair labor charges filed against the petitioners resulted in an order of the National Labor Relations Board determining it to have been guilty of unfair labor practices and ordering it to bargain with the intervening locals of the Retail Clerks International Association. The matter is here presented under a petition to review and to set aside that order and under the Board's cross-petition for its enforcement.

Petitioners are engaged in the operation of discount retail department stores in various states in-

cluding Ohio, New York, Massachusetts, Indiana and Maryland. In January, February and March of 1965 separate charges were filed by individual locals of the International and by the International itself in the First, Third, Fifth, Ninth, Thirteenth and Twenty-fifth Regional Offices of the National Labor Relations Board. Each alleged a refusal to bargain by the petitioners, in addition to alleging other unfair labor practices. After dismissal of those in the two latter Offices, those from the other Offices were consolidated for hearing and the decision of the Board in the consolidated cases is reported at 169 NLRB No. 43. In the present review the issues arise from the operation of the stores in Springfield, Ohio, and Glen Falls, New York.

The Board found the petitioners guilty of unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) at the Springfield, Ohio, store, primarily on the basis of a request allegedly made by one of its managers to an employee asking that she "talk against the Union" at a meeting, and of statements allegedly made by a department head and a store manager to a second employee, coupled with a five cent an hour increase to her. Based on a review of the printed record only we would be hard pressed to reach the conclusions arrived at by the Trial Examiner, who, "following a familiar pattern," credited the testimony of the employees and discredited that of the witnesses for the petitioners. *N.L.R.B.* v. *Welsh Industries*, 385 F.2d 538, 540 (6th Cir. 1967); see also *N.L.R.B.* v. *Fischbach Trucking Co.*, 398 F.2d 352 (6th Cir. 1968). However, it cannot be said that the Board's conclusions are not supported by substantial evidence or are clearly erroneous, and we therefore cannot disturb them. Section 160(e), Title 29,

U.S.C.; *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 490-491 (1951).

The Board found that petitioners committed several violations of Section 8(a)(1) of the Act at the Glens Falls store by intimidating an employee for conversing with the Union organizers, by advising employees that it had a list of those who had signed cards, by interrogating them as to their union activity, by threatening that signing a card would jeopardize jobs, and by engaging in surveillance of union meetings. Again, were it our function to reach an independent determination on the basis of the record it is probable that it would be at variance from that made by the Trial Examiner, but the determination of the Board must be permitted to stand since it is supported by substantial evidence and is not clearly erroneous.

While in accordance with the foregoing enforcement of the Board's order will be decreed to the extent that it requires petitioners to cease and desist from the unfair labor practices and from in any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights, we entertain doubt as to the propriety of ordering bargaining at the Glens Falls store at this late date. Although the charge in connection with the Glens Falls store was filed January 7, 1965, the Trial Examiner did not issue his decision until nearly a year later (December 30, 1966), and the order of the Board did not follow until November 16, 1967. The determination of the Union's majority status was made on the basis of the store payroll as of December 22, 1964, and we need not resort to judicial notice to determine that retail clerical personnel is not unvarying since it is apparent from this record that in this store changes in personnel status were frequent.

We therefore conclude that we may not with justification assume that the majority status persists which existed years ago. We are not unmindful of the general rule to the effect that a condition shown to exist will be presumed to continue until the contrary is shown, but this rule is without application to this situation where the record discloses the original condition not to have been a constant one and where a protracted period of time has elapsed. We add that our apprehension on this score is hardly abated by the fact that the 1964 majority determination was made on the basis of authorization cards, "a notoriously unreliable method of determining the majority status of a union." *N.L.R.B.* v. *Flomatic Corporation*, 347 F.2d 74, 78 (2d Cir. 1965); *Pulley* v. *N.L.R.B.*, 395 F.2d 870 (6th Cir. 1968); *Peoples Service Drug Stores, Inc.* v. *N.L.R.B.*, 375 F.2d 551 (6th Cir. 1967).

In accordance with the foregoing, enforcement of the Order of the National Labor Relations Board entered November 16, 1967, is granted to the extent not inconsistent herewith, and the case is remanded to the National Labor Relations Board for a determination as to whether in view of the passage of time since the entering of its Order that portion thereof requiring petitioners to bargain collectively with Local 1262, Retail Clerks International Association, AFL-CIO, is still appropriate. Specifically, the Board is enjoined to determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made. If such change is found to have been substantial it is directed that the Board cause a representation election to be conducted.

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